M/S LAKSAMANA REALTY SDN BHD

v.

GOH ENG HWA

COURT OF APPEAL, KUALA LUMPUR
ABDUL HAMID MOHAMAD JCA
MOHD NOOR AHMAD JCA
ABDUL AZIZ MOHAMAD JCA
[CIVIL APPEAL NOS: M-02-347-2001, M-02-388-2001
& M-02-530-2001]
7 NOVEMBER 2003

BANKRUPTCY: *Capacity of bankrupt - Filing of counterclaim - Whether bankrupt had locus standi to file counterclaim - Whether sanction of official assignee covered filing of counterclaim - Whether property should be assigned to bankrupt before filing of counterclaim - Whether issue on locus standi could be raised in submission and need not be pleaded - Bankruptcy Act 1967, s. 38(1)(a)*

This was one of three related appeals (appeal no. M-02-388-2001) in which the court had to first decide on whether the respondent who was a bankrupt had the *locus standi* to file his counterclaim in respect of the appellant's suit against him.

The issues were: (1) whether the sanction of the official assignee ('OA') given to the respondent under s. 38(1)(a) of the Bankruptcy Act 1967 ('the Act') was confined only to the respondent defending the action and not the filing of his counterclaim; (2) whether the OA should assign the property concerned to the respondent before the respondent was competent to file the counterclaim; and (3) whether the issue on *locus standi* should be pleaded and not raised in submission.

Held:
Per Abdul Hamid Mohamad JCA

[1] All that is required to enable a bankrupt to maintain an action as provided by s. 38(1)(a) of the Act is to obtain the sanction of the OA. No assignment is required. The respondent was competent to file the counterclaim as he had obtained the sanction from the OA prior to his filing thereof. (p 281 e-f)

[2] The requirement of a sanction is not just a formality. Without the sanction, a bankrupt is incompetent to maintain an action. It goes to his capacity. If he is incompetent to file the counterclaim without the previous sanction then the filing of the counterclaim will be null and void. The case being a nullity for lack of capacity or competency, the question of pleading does not arise. Therefore the appellant was entitled to raise the issue in the course of submission. (pp 281 g-i & 282 a-b)

Per Mohd Noor Ahmad JCA

[1] The sanction of the OA covered the counterclaim filed by the respondent. Further, there was no need for the OA to assign the property to the bankrupt for him to maintain the action. The purpose of the Act was to vest the bankrupt's property in the OA for the benefit of his creditors so as to prevent dissipation. As far as the respondent's claim for trespass was concerned, the respondent had the necessary *locus standi* because trespass was essentially an interference with the possessory rights and not ownership. (pp 282 g-h & 283 a-f)

[2] The issue of *locus standi* need not be pleaded and the appellant was not barred from raising the issue in the course of submission. (pp 283 g-h)

Per Abdul Aziz Mohamad JCA

[1] As the question of *locus standi* was raised only in submission, the circumstances in which the sanction was obtained was not examined in evidence. To decide on the intention of the OA to be inferred from the circumstances on whether the sanction covered a counterclaim, would be a decision of a factual nature. As the appellant did not raise this issue during the trial so as to enable the circumstances to be examined, it was precluded from raising this issue. However, the sanction so worded in this case did not exclude the counterclaim that the respondent brought. Although the respondent's claim was a separate and distinct claim, it was brought within the scope of the appellant's civil suit against him. (pp 288 e, 289 b-c & 290 c-d)

[2] The respondent did not have a cause of action to sue in respect of the property concerned as the said property was vested in the OA. The OA's sanction under s. 38(1)(a) of the Act did not serve the purpose of re-vesting the property in the respondent so as to give him a cause of action and *locus standi*. However, the question of *locus standi* in this case was not serious because if the respondent finally succeeded in his claim, the

damages awarded to him would vest in the OA. Further, the OA did not object to the respondent suing despite the appellant's contention that the property concerned and the right to sue in respect thereof vest in the OA and not the respondent. In the circumstances of the case, the appellant ought not to be allowed to raise and pursue the *locus standi* issue. (pp 291 d-e & 295 e-g)

[Appeal on locus standi dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah satu daripada tiga rayuan yang saling berkait (rayuan no. M-02-388-2001) di mana mahkamah pertamanya perlu memutuskan sama ada responden, seorang bankrap, mempunyai *locus standi* untuk memfailkan tuntutan balas terhadap tuntutan yang difailkan perayu terhadapnya.

Isu-isunya adalah: (1) sama ada sanksi atau izin yang diberikan Pegawai Penerima ('PP') kepada responden di bawah s. 38(1) Akta Kebankrapan 1967 ('Akta') hanya terhad kepada membenarkan responden membela tuntutan dan bukan memfail tuntutan balas; (2) sama ada PP harus terlebih dahulu menyerahhak harta berkenaan kepada responden sebelum defendan berkompeten untuk memfail tuntutan balas; dan (3) sama ada isu berkaitan *locus standi* perlu diplid dan bukannya dibangkitkan semasa penghujahan.

Diputuskan:
Oleh Abdul Hamid Mohamad HMR

[1] Seperti diperuntukkan s. 38(1)(a) Akta, apa yang diperlukan oleh seorang bankrap bagi membolehkannya memulai tindakan hanyalah suatu sanksi dari PP. Serahanhak adalah tidak diperlukan. Responden berkompeten untuk memfailkan tuntutan balas oleh kerana beliau telah pun memperoleh sanksi dari PP sebelum pemfailan yang berkaitan.

[2] Keperluan sanksi bukan satu formaliti semata-mata. Tanpa sanksi, seseorang bankrap tidak berkompeten untuk meneruskan tindakan. Ia berkait dengan kapasitinya. Jika beliau tidak berkompeten untuk memfail tuntutan balas tanpa terlebih dahulu memperolehi sanksi, maka pemfailan tuntutan balasnya akan menjadi batal dan tak sah. Apabila kes menjadi terbatal atas alasan tiada kapasiti, maka soal pliding tidak timbul lagi. Oleh yang demikian, perayu berhak untuk membangkitkan isu berkenaan semasa penghujahan.

Oleh Mohd Noor Ahmad HMR

[1] Sanksi oleh PP merangkumi tuntutan balas yang difailkan oleh responden. Selain itu, tiada keperluan bagi PP untuk menyerahhak harta tersebut kepada si bankrap bagi membolehkannya memfail tindakan. Ini tidaklah bertentangan dengan tujuan Akta meletakkan harta si bankrap kepada PP bagi menghalang pelupusan bagi faedah pemiutang-pemiutang. Berkaitan dengan tuntutan pencerobohan responden, responden jelas mempunyai *locus standi* oleh kerana pencerobohan pada intinya adalah suatu gangguan terhadap hak pemilikan dan bukannya terhadap kepemunyaan.

[2] Isu *locus standi* tidak perlu diplidkan dan perayu tidak dihalang dari membangkitkan isu tersebut sewaktu penghujahan.

Oleh Abdul Aziz Mohamad HMR

[1] Oleh kerana soal *locus standi* hanya dibangkitkan semasa penghujahan, halkeadaan dan suasana pemerolehan sanksi telah tidak diteliti. Membuat keputusan mengenai hasrat PP berdasarkan halkeadaan dan persoalan sama ada sanksi merangkumi tuntutan balas, akan menjadikan keputusan tersebut suatu keputusan yang bersifat kefaktaan. Oleh kerana perayu tidak membangkitkan isu ini semasa perbicaraan, bagi membolehkan halkeadaan-halkeadaan tersebut diteliti, maka ia dihalang dari membangkitkan isu tersebut. Walaupun begitu, sanksi dalam kes ini sebagaimana ianya diolah, tidak mengetepikan tuntutan balas yang dibuat oleh responden. Walaupun tuntutan responden satu tuntutan lain yang berasingan, ia masih terangkum ke dalam skop tindakan sivil perayu terhadapnya.

[2] Responden tidak mempunyai kausa tindakan untuk mendakwa berkaitan harta tersebut oleh kerana harta itu telah diletakhak kepada PP. Sanksi PP di bawah s. 38(1)(a) Akta tidak bertujuan untuk mengembalikan perletakan hak harta kepada responden bagi memberikannya kausa tindakan serta *locus standi*. Walau bagaimanapun, persoalan *locus standi* di sini tidaklah serius kerana jikapun responden akhirnya berjaya dalam tuntutannya, gantirugi yang diaward kepadanya akan terletakhak kepada PP. Lagipun, PP tidak membantah terhadap responden mendakwa walaupun perayu berhujah bahawa harta berkenaan dan hak untuk mendakwa terletakhak kepada PP dan bukannya responden. Dalam halkeadaan kes, perayu tidak harus dibenar membangkitkan dan memanjangkan isu *locus standi* ini.

Rayuan atas locus standi ditolak.]

Case(s) referred to:
Chin Kon Nam v. Chai Yun Pin Development Sdn Bhd [1996] 1 CLJ 444 HC ***(refd)***
K Ismail Ganey Rowther v. MA Abdul Kader [1933] 2 FMSR 98 ***(refd)***
North Western Salt Co v. Electrolytic Alkali Co [1914] AC 461 ***(refd)***
Ramsey v. Hartley [1997] 1 WLR 186 ***(refd)***
Re Khoo Kim Hock [1974] 2 MLJ 29 ***(refd)***
Re Mat Sari Hamid ex p United Asian Bank Bhd [1993] 1 CLJ 202 HC ***(refd)***
Sabah Bank Bhd v. Syarikat Bintang Teguh Sdn Bhd & Ors [1992] 2 MLJ 588 ***(refd)***
Superintendent of Lands and Surveys (4th Div) v. Hamit Matusin [1994] 3 CLJ 567 SC ***(refd)***
Supreme Finance (M) Bhd v. Mohamad Nor & Ors [1993] 2 MLJ 29 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, ss. 24(4), 38(1)(a), 48(1)(b), 60(a), (d), 61(b)
Bankruptcy Enactment 1912, s. 33(i)(a)
Interpretation Acts 1948 and 1967, s. 17A
Rules of the High Court 1980, O. 18 rr. 7(1), 8(1)

Bankruptcy Act 1914 [UK], s. 55(1)

Other source(s) referred to:
Malaysian High Court Practice, 1998 Desk Edition, vol 1, p 482

For the appellant - Trevor George De Silva; M/s Shook Lin & Bok
For the respondent - B Thangaraj (Azad Bashir & Shaari Nor); M/s Bashir & Asha
For the official assignee - Rohatul Akmar Abdullah SFC

[Appeal from High Court, Melaka; Civil Suit No: 22-144-1991]

Reported by Usha Thiagarajah

JUDGMENT

Abdul Hamid Mohamad JCA:
I have had the advantage of reading the draft judgment of my brother Abdul Aziz Mohamad who has set out the facts in great detail. In this judgment I shall only state the facts briefly.

On 11 August 1983, Laksamana Realty Sdn. Bhd. ("Laksamana") entered into an agreement with Goh Eng Hwa ("Goh"). According to the agreement, in consideration of RM30,000 paid by Laksamana to Goh, Goh agreed, *inter alia*, to deliver vacant possession of the land in question by 15 August 1984. Goh failed to do so. On 7 November 1991, Laksamana filed Civil Suit No. 22-144-1991 claiming vacant possession of the said land. On 10 April 1992 Goh entered appearance. On 16 April 1992 Goh was adjudged bankrupt. As Goh did not file his defence, on 26 May 1992, Laksamana entered judgment in

default. The order required Goh to deliver vacant possession in 30 days. Again Goh failed to comply. On 20 June 1995 Laksamana obtained a writ of possession.

On 8 September 1995 the official assignee wrote to the court informing the court that "kebenaran telah diberi kepada sibankrap (Goh – added) untuk meneruskan tindakan kes Guaman Sivil No. 22-144-91".

On 15 September 1995 Goh applied for an order to set aside the judgment in default and for a stay of execution of the judgment. The application was fixed for hearing on 8 September 1995. However, one week earlier, on 1 September 1995, the writ of possession was executed.

On 17 October 1995, Goh filed another application praying for similar orders. This second application was heard and the judgment in default was set aside. An order for a stay of execution was also granted. This happened on 28 November 1995.

On 9 December 1995 Goh filed his statement of defence and counterclaim. Goh having agreed to deliver vacant possession, only Goh's counterclaim was left to be tried. In his counterclaim, Goh alleged that Laksamana had wrongfully demolished the premises and removed certain goods of his which was subsequently lost and committed trespass on land. He claimed damages for all that.

The trial of Goh's counterclaim commenced on 3 June 1969. On 19 September 2000, in the course of his submission, Laksamana's counsel raised for the first time the issue of *locus standi*. The trial was postponed to 6 November 2000 for further submission.

On 6 November 2000 Goh filed an application to amend his statement of defence and counterclaim to add the official assignee as a party.

On 5 March 2001, the learned judge dismissed Laksamana's objection as to Goh's *locus standi*. He also dismissed Goh's application for the amendments. Goh appealed against this order (dismissing the application to amend). That appeal is appeal No. M-02-347-2001.

On 20 April 2001, the learned judge allowed Goh's counterclaim. He ordered Laksamana to pay Goh RM400,000 as general damages for trespass, conversion and negligence and RM50,000 as exemplary damages. He also ordered Laksamana to pay Goh RM70,000 as balance due to him under the agreement dated 11 August 1988. Laksamana appealed against that order – appeal No. M-02-388-2001. Goh also appealed against the quantum of damages – appeal No. M-02-530-2001.

When the appeal came up before us Goh's counsel conceded that the sum of RM70,000 ought not to have been ordered. That is, therefore, set aside.

We decided to hear the issue of *locus standi* first, ie, in appeal number M-02-388-2001.

It was argued by learned counsel for Laksamana that Goh had no *locus standi* to file the counterclaim. The sanction given did not cover the filing of a counterclaim. It was also argued that the sanction under s. 38 was insufficient for Goh "to maintain any action". The property having been vested in the official assignee, Goh had no rights or interest in the property unless it was assigned to Goh, which was not done. Lastly, it was also argued that *locus standi* need not be pleaded but may be raised at any time.

Section 38(1) of the Bankruptcy Act 1967 reads:

> 38.(1) Where a bankrupt has not obtained his discharge:
>
> (a) the bankrupt shall be incompetent to maintain any action (other than an action for damages in respect of an injury to his person) without the previous sanction of the Official Assignee.

Goh had, prior to filing the counterclaim, obtained the sanction of the official assignee. The question then is whether the sanction covers the filing of the counterclaim. The sanction, reproduced earlier, is actually the Malay translation of the relevant words of s. 38(1)(a). The short answer to the question is, if those words of s. 38(1)(a) cover counterclaim, then the same words, in Malay, should cover the filing of a counterclaim. Otherwise, it would not be necessary for Goh to obtain the sanction at all.

The next question is, is it necessary for the official assignee to assign the property to the respondent (in addition to giving the sanction under s. 38(1)(a)), before Goh becomes competent to file the counterclaim?

This calls for an examination of the relevant provisions of the Act.

Section 24(4) provides:

> (4) When a debtor is adjudged bankrupt his property shall become divisible among his creditors and shall vest in the Official Assignee.

Section 38(1)(a) which has already been reproduced says that a bankrupt shall be incompetent to maintain an action without the sanction of the official assignee. The exception is as regards an action for damages in respect of an injury to his person, which is not the case here. There is no mention of divesting or assignment of the property to the bankrupt for that purpose.

Section 60 provides for the powers of the official assignee to deal with the property which includes to sell the property (s. 60(a)) and to execute any powers of attorney, deeds and other instruments for the purpose of carrying into effect of the Act (s. 60(d)).

Section 68 empowers the official assignee to allow the bankrupt to manage the property. Allowance may be given to the bankrupt for the service. Again, there is no mention of divesting or assignment of the property to the bankrupt for the purpose.

I have no doubt that the powers under s. 60(d) includes the power to execute a deed of assignment. But, that is one of the powers given to the official assignee. But must that provision be read into s. 38(1)(a) when both sections make no mention of it? I do not think so. I see no reason why the provisions of s. 60(d) should be read into s. 38(1)(a). If sanction alone is not sufficient to enable the bankrupt to maintain an action, that section would have said so, or at least a reference to it would be made in other sections. There is nothing to that effect. And, if the property is assigned to the bankrupt, there is nothing to prevent the bankrupt from disposing it. It is because the property is vested in the official assignee that the sanction of the official assignee is required for the bankrupt to maintain an action involving the property. If the property is not vested in the official assignee or if it is assigned to the bankrupt, there would be no necessity for the sanction anymore. The bankrupt, having the rights and interest in the property, clearly has an inherent right to maintain an action over it.

In conclusion, it is my view that, all that is required to enable a bankrupt to maintain an action as provided by s. 38(1)(a), is for him to obtain the sanction of the official assignee. No assignment is required. The respondent having obtained the sanction prior to his filing the counterclaim, he is competent to do so.

The other point is whether the issue of *locus standi* should have been allowed to be raised at all during the submission, it not having been pleaded in the statement of defence. The requirement of a sanction is not just a formality. Without the sanction a bankrupt is "incompetent" to maintain an action. It goes to his capacity. If he is incompetent to file the counterclaim without "the previous sanction" then the filing of the counterclaim without the previous sanction would have been null and void. The act being a nullity for lack of capacity or competency, the question of pleading does not arise. We see, for example, in *Chin Kon Nam v. Chai Yun Pin Development Sdn. Bhd.* [1996] 1 CLJ 444 the issue was raised as "a preliminary objection on a point of law". In *Supreme Finance (M) Bhd. v. Mohamad Nor (t/a Everway Food Centre)*

a *& Ors.* [1993] 2 MLJ 29, in *Sabah Bank Bhd. v. Syarikat Bintang Tengah Sdn. Bhd. & Ors* [1992] 2 MLJ 588 and in *Re Mat Sari bin Hamid, Ex Parte United Asian Bank Bhd.* [1993] 1 CLJ 202 the issue arose in an application to set aside a default judgment.

b So, I do not think it is right to say that to raise the issue, it must be pleaded. In the circumstances I am of the view that the appellant was entitled to raise the issue even in the course of submission. However, for reasons given earlier, it is my decision that the respondent has the *locus standi* to file the counterclaim.

c I would dismiss the appeal on the issue of *locus standi* in appeal number M-02-388-2001 with costs. A new date will have to be given for the hearing of all the three appeals on their merits.

Mohd Noor Ahmad JCA:

d In Appeal No. M-02-388-2001 only the issue of *locus standi* is considered.

I have had the advantage of reading the draft judgments of both my learned brothers.

I need not repeat the facts of the case as they have been sufficiently stated therein.

e

I gather from the judgment that they deal with three issues *viz.*:

(i) whether the sanction of the official assignee covered the filing of the counterclaim by Goh (the respondent);

f (ii) whether it was necessary for the official assignee to assign the property to the respondent (in addition to giving the sanction under s. 38(1)(a) of the Bankruptcy Act 1967) (the Act), before the respondent became competent to file the counterclaim; and

g (iii) whether Laksamana (the appellant) was entitled to raise the issue of *locus standi* in the course of submission even though it was not pleaded.

On issue (i), my learned brothers concluded that the sanction covered the counterclaim. I agree with them for the same reason. With regard to issue (ii), my learned brother Abdul Hamid Mohamad JCA (now FCJ) concluded that *h* no assignment was required; and the respondent, having obtained the sanction prior to his filing the counterclaim, was competent to do so. His reasonings are lucid. I need not repeat. My learned brother Abdul Aziz Mohamad JCA did not make any pronouncement as to assignment. However, he held that the

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respondent's property being vested in the official assignee, he did not have a cause of action on which to sue in respect of the property involved, and therefore, did not have the *locus standi* to do so, and that the official assignee's sanction given under s. 38(1)(a) did not serve the purpose of revesting the property in him so as to give him the cause of action and *locus standi*. He relied on the authority of *K. Ismail Ganey Rowther v. M.A. Abdul Kader* [1933] 2 FMSR 98 CA. I am in agreement with my learned brother Abdul Hamid Mohamad JCA for the same reason. In addition, I am of the view that the scheme of the Act in relation to a bankrupt's property is to vest the property in the official assignee for the benefit of his creditors, thus preventing dissipation. That is the intention of Parliament. Section 17A of the Interpretation Acts 1948 and 1967 (the Acts) requires the court to apply the purposive approach in the interpretation of any provision of an Act. In short, it calls for a literal and purposive construction. Hence, the need for the official assignee to assign the property to the bankrupt for him to maintain the action is not consonant with the purpose. Section 17A was introduced into the Acts by Act A996 on 24 July 1997. Therefore, the precedent in *K. Ismail Ganey Rowther v. M.A. Abdul Kader* decided almost seven decades ago is archaic and should not be followed. Further, the respondent's causes of action against the applicant are for trespass, conversion and negligence in respect of part of the land and goods lost that were in his possession, though vested in the official assignee. In my view, at least for trespass, the respondent has the *locus standi* to institute the counterclaim because it is trite law that trespass is essentially an interference with the possessory rights and not ownership since registered ownership does not usually connote legal possession. The legal owner including the official assignee can only sue for trespass if no one else is in possession of that part of the land or goods. In respect of issue (iii), my learned brother Abdul Hamid Mohamad JCA concluded that the issue of *locus standi* need not be pleaded; hence, the appellant was not barred from raising the issue in the course of submission. His reasonings are also clear; hence, they need not be repeated. However, my learned brother Abdul Aziz Mohamad JCA appears to conclude that it must be pleaded but, in the circumstances of the case the appellant ought not to be allowed to raise and pursue the *locus standi* issue. With due respect, I am inclined to agree with the former for the same reason.

Therefore, on the threshold question, that is to say, the *locus standi* issue I conclude that the respondent has the *locus standi* to institute the counterclaim. The appeal grounded on *locus standi* is dismissed with costs.

Abdul Aziz Mohamad JCA:

There are before us three appeals which arose from the disposal by the High Court at Melaka of the counterclaim in Civil Suit No. 22-144-1991, in which civil suit a company ("Laksamana") sued a person who had been occupying a portion of their land ("Goh") for vacant possession of the land.

The events leading to the three appeals need to be set out.

Laksamana and Goh had on 11 August 1983 entered into an agreement whereby, for a consideration of RM30,000, which Laksamana claimed Goh had received, Goh had agreed to relinquish his rights and interests in the premises that he had been occupying on the land and to deliver vacant possession of the land by 15 August 1984. Goh having failed to deliver vacant possession, on 7 November 1991 Laksamana filed the civil suit, claiming vacant possession. Goh entered appearance on 10 April 1992 but on 16 April 1992 he was adjudged bankrupt. No defence having been filed, on 26 May 1992 judgment in default of defence was entered against Goh ordering him to deliver vacant possession within thirty days, but that was not done. So on 20 June 1995 Laksamana obtained a writ of possession.

On 15 August 1995 Goh applied for the setting aside of the judgment in default and for stay of execution of the judgment. In his affidavit in support of the application, Goh mentioned the fact of his bankruptcy as resulting in his solicitors' ceasing to act for him and consequently in the judgment in default being entered against him. The application and affidavit were served on Laksamana's solicitors on 21 August 1995, so that on that date, if not earlier, Laksamana knew that Goh was a bankrupt. The hearing of the application was fixed for 8 September 1995 but before that date, on 1 September 1995, the writ of possession was executed.

On 8 September 1995 the official assignee wrote to the court saying that "kebenaran telah diberi kepada sibankrap untuk meneruskan tindakan kes Guaman Sibil No. 22-144-91". The letter was signed by Encik Mohd. Noor bin Mohd. Alias, assistant official assignee, Melaka, on behalf of the official assignee.

For some reason that is not apparent from the record of appeal, but maybe because it was filed before the official assignee's sanction was obtained, the setting-aside application of 15 August 1995 was apparently not proceeded with, because Goh filed another setting-aside application on 17 October 1995. On that application, on 28 November 1995 the judgment in default was set aside because, so we are informed by Laksamana through para. 11 of their outline of submission, the judgment in default had been obtained when Goh was a

bankrupt without the sanction of the official assignee. A stay of execution was also granted but Laksamana had already executed and obtained possession on 1 September 1995.

On 9 December 1995 Goh filed his statement of defence and counterclaim. We are informed through para. 13 of Laksamana's outline of submission that by a consent order dated 17 September 1997 Goh agreed to hand over to Laksamana vacant possession of the land. With that, there was left to be tried only Goh's counterclaim, which was amended on 26 January 1998.

In his amended counterclaim Goh alleged that in executing the writ of possession on 1 September 1995 Laksamana had wrongfully demolished his premises which were on the portion of the land occupied by him, and, without prior notice, wrongfully and negligently removed from the premises certain goods of his which were subsequently lost, and also had committed trespass on that portion of the land, which trespass, Goh claimed, continued until 17 September 1997, the date on which Goh consented to hand over vacant possession of the land. Goh claimed special damages, general damages and exemplary damages for trespass, conversion and negligence. The special damages were in respect of the premises and goods and the amount claimed was RM835,095.

The trial of Goh's counterclaim commenced on 3 June 1999. Before the giving of evidence commenced, and even while giving evidence as Goh's witness, Encik Mohd. Noor, the assistant official assignee, referring to his letter of 8 September 1995, confirmed that the official assignee's sanction had been obtained. After witnesses of both sides had been examined, submissions commenced on 19 September 2000 with the submission of Laksamana's counsel, Encik Trevor De Silva, who had taken over from Laksamana's previous counsel after the examination of Goh's witnesses and in the midst of the examination of the last but one of Laksamana's five witnesses. Encik De Silva commenced his submission by raising, for the first time, a point of law concerning Goh's *locus standi* which had not been pleaded by Laksamana or put to any of Goh's witnesses, not even to Encik Mohd. Noor. The point was that with Goh's bankruptcy his assets vested in the Official Assignee who alone had the *locus standi* to institute a counterclaim, which is a fresh action, in respect of the assets and that the sanction of 8 September 1995 was not sufficient to confer *locus standi* on Goh to institute the counterclaim when he did so on 9 December 1995. The judge gave Goh liberty to file a written submission in reply on the locus standi issue and proceeded to hear submission on Goh's counterclaim. The trial was postponed to 6 November 2000 for further submission.

On 6 November 2000 Goh filed an application by summons in chambers to amend his statement of defence and counterclaim by adding the official assignee as a second defendant to the action, and so as the second plaintiff in the counterclaim. The hearing of the summons in chambers was fixed for 6 November 2000 itself but was adjourned to another date to enable Laksamana's counsel to respond to the application. After hearing submissions on the application, including submission on behalf of the official assignee, who, having agreed to be joined as the second defendant in the action, supported the application, on 2 March 2001 the judge dismissed Laksamana's objection as to Goh's *locus standi*, holding that Goh was entitled to institute the counterclaim. He therefore dismissed Goh's amendment application and proceeded to hear further submission on the counterclaim.

On 30 March 2001 Goh filed his notice of appeal against the dismissal of his amendment application. Goh was concerned to ensure that should the *locus standi* question be decided against him on appeal, he would still have his application to fall back on. That is appeal No. M-02-347-2001.

On 20 April 2001 the judge allowed Goh's counterclaim and ordered Laksamana to pay Goh RM400,000 as general damages for trespass, conversion and negligence and RM50,000 as exemplary damages. He also ordered Laksamana to pay Goh RM70,000 as some balance due to him under the agreement of 11 August 1988.

On 30 April 2001 Laksamana filed their notice of appeal against the whole of the judge's decision. That is appeal No. M-02-388-2001.

On 17 May 2001 Goh filed his notice of appeal against the quantum of damages. That is appeal No. M-02-530-2001.

Those are the three appeals. They came before us on 3 October 2002 when it was agreed by both parties that Laksamana's appeal, appeal No. 388, be heard first and that in that appeal the question of Goh's *locus standi* be decided first.

It was conceded for Goh that the sum of RM70,000 ought not to have been ordered because Goh had not claimed it. So the order as to that sum will in any event have to be set aside.

As Goh's appeal against the dismissal of his amendment application is yet to be heard, the question of *locus standi* that we have to decide now must be considered as a separate question from the question of the merits of Goh's amendment application.

According to s. 24(4) of the Bankruptcy Act 1967, "when a debtor is adjudged bankrupt his property shall become divisible among his creditors and shall vest in the official assignee".

According to s. 48(1)(b) of the Act, among the property that shall comprise the property of the bankrupt that is divisible among his creditors and that is referred to in the Act as "the property of the bankrupt" are:

> (i) all such property as belongs to or is vested in the bankrupt at the commencement of the bankruptcy or is acquired by or devolves on him before his discharge; and
>
> (ii) the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of bankruptcy or before his discharge.

Subparagraph (i) may apply to Goh's goods and premises in this case.

Section 61(b) of the Act empowers the official assignee to "bring, institute or defend any action or other legal proceeding relating to the property of the bankrupt".

There is no dispute that the "kebenaran" mentioned in the official assignee's letter of 8 September 1995 was a sanction of the official assignee under para. (a) of s. 38(1) of the Act, which paragraph provides as follows:

> The bankrupt shall be incompetent to maintain any action (other than an action for damages in respect of an injury to his person) without the previous sanction of the Official Assignee.

Laksamana's argument about Goh's *locus standi* is twofold. First they say that the sanction of 8 September 1995 was confined only to defending their action and did not extend to the making of a counterclaim, which in law is a separate and independent action from the claim. Their reasons for so contending are because the sanction did not expressly say that it covered a counterclaim and because the counterclaim was filed three months after the date of the sanction letter. See para. 21(i) of Laksamana's outline of submission. As the fact that the counterclaim was filed three months after the sanction was given cannot logically mean that the sanction was not given for the counterclaim, what the second reason probably means is that because the counterclaim was filed three months after the sanction was given, the official assignee could not have known about the counterclaim when giving the sanction and therefore could not have intended the sanction to apply to the counterclaim.

The second part of Laksamana's argument is that even if the sanction covered the counterclaim, it was still not sufficient to confer *locus standi* on Goh to institute the counterclaim because, Goh's property being vested in the official assignee, only the official assignee had the capacity to institute the counterclaim at the time it was instituted.

The consequence of either part of the argument, according to Laksamana, is that Goh had no *locus standi* when he filed the counterclaim and the counterclaim was therefore bad in law and was a nullity or was *void ab initio.*

I shall deal first with the first part of the argument. Our attention is drawn by para. 21(i) of Laksamana's outline of submission to the fact revealed at p. 427 of the record of appeal that in para. 3 of Goh's affidavit in support of his first application dated 15 August 1995 to set aside the default judgment, Goh had said that he could defend Laksamana's action if he had the official assignee's sanction. That statement was repeated in para. 4 (to be seen at p. 484 of the record of appeal) of Goh's affidavit in support of his second application dated 17 October 1995 to set aside the default judgment. Laksamana therefore contend that Goh needed a sanction only to defend the action and that therefore the official assignee could not have meant to give sanction to counterclaim. In my view those paragraphs cannot be used to argue that Goh did not also need a sanction to counterclaim because the applications being applications for the setting aside of the default judgment, Goh needed only to speak about defending the action and not also about counterclaiming.

Because the question of locus standi was raised only in submission, the question of the circumstances in which the sanction was obtained was not examined in evidence, so that it is not in evidence when was it that Goh applied for the sanction that was obtained on 8 September 1995, what was it that Goh said in his application as to what he needed the sanction for, and what the official assignee's intention was in giving the sanction. We know that the events that prompted Goh to make the counterclaim happened on 1 September 1995 when Laksamana executed the writ of possession. We have the evidence of Encik Mohd. Noor in the trial that on that day Goh went to see him and they together went to witness the execution and that on 4 September 1995 he saw Goh's goods stacked in an open space at a roadside, unattended and not fenced up. Then on 8 September 1995 Encik Mohd. Noor signed the letter of sanction. Could not the official assignee, when giving the sanction, have known through Encik Mohd. Noor of the likelihood of Goh wishing to make a counterclaim? Then at the date of the trial, when Goh had already consented to hand over vacant possession, so that he was no longer defending Laksamana's claim and there was left only Goh's counterclaim to be tried, Encik Mohd. Noor confirmed

the sanction of 8 September 1995, thus impliedly saying that that was the sanction for the counterclaim. On the other hand, had Laksamana taken up the issue during the trial and cross-examined Encik Mohd. Noor, the outcome might not support the implication.

So if on this appeal Laksamana's intention is to request us to decide, as a matter of intention of the official assignee to be inferred from the circumstances, whether the sanction covered a counterclaim, I do not think we ought to entertain such a request. It will be a decision of a factual nature. Laksamana not having raised the question during the trial so as to enable the circumstances to be examined, they are precluded from making such a request. A decision on that basis will be purely conjectural.

The question can only be decided by construing the sanction in the light of s. 38(1)(a). A sanction under that section can only be one to "maintain any action". In giving the sanction the official assignee may, if necessary, specify what he means or does not mean to be the action whose maintenance he is sanctioning, so as to make perfectly clear the scope of the sanction. In the present case the sanction was stated to be "untuk meneruskan tindakan kes Guaman Sibil No. 22-144-91", without any specific qualification. The words "untuk meneruskan" were, I think, an attempt to say "to maintain" in Malay because the first dictionary meaning of "maintain" is to "cause to continue". Therefore the sanction was, to put it in English, "to maintain the action of the Civil Suit No. 22-144-91 case". There is one thing that may be argued about the word "maintain" but which Laksamana did not take up. It is that to maintain being to cause to continue, the section does not authorize the official assignee to sanction the institution of a fresh action. In my opinion the words "maintain any action" in the section are not restricted to continuing an action that has already begun. If an action that has already begun requires a sanction, there is more reason to require a sanction for bringing a fresh action. And there is no reason to suppose that Parliament, by using the word "maintain", intended that a bankrupt should not be given sanction to undertake a fresh action. The word "maintain" has necessarily to include commencing an action because immediately after commencing it one is maintaining it. My opinion is in fact preceded in *K. Ismail Ganey Rowther v. M.A. Abdul Kader* [1933] 2 FMSR 98, a decision of the Court of Appeal of the Federated Malay States, where Thorne Ag. CJ at the end of his judgment said, in reference to s. 33(i)(a) of the Bankrupty Enactment 1912, which section was virtually identical to s. 38(1)(a) of the 1967 Act:

> My view of the words 'maintain any action' is that they are wide enough to cover both the bringing or continuing of an action already brought.

One other thing that may be argued about the word "maintain", but which Goh did not argue, is that it refers more to the person to whom the action belongs rather than to his adversary. In respect of Laksamana's claim alone, it was Laksamana who maintained the action. Goh, if he continued to defend it, could not be said to be maintaining Laksamana's action. So if it were a matter solely of Goh's defending Laksamana's action, Goh could hardly be said to be maintaining any action, and it may be argued, although I am not so deciding, that Goh did not need any sanction to defend the action. But were Goh to be suing Laksamana, as he subsequently did in this case, he certainly would be maintaining an action and there cannot be any question as to the need for a sanction under the section and as to the applicability to Goh's counterclaim of the sanction that was given.

In my judgment, therefore, the sanction was so worded in this case that there is no good reason to construe it so as to exclude from its scope the counterclaim that Goh brought. Although Goh's claim was a separate and distinct claim, it was brought within the scope of Civil Suit No. 22-144-91. The civil suit not being Goh's, and the action, therefore, not being his, it may fittingly be said, on account of the counterclaim, that he was maintaining the action of the civil suit, a situation that is consonant with the wording of the sanction. I hold, therefore, that the sanction covered the counterclaim.

For the second part of their argument, Laksamana rely on the *K. Ismail Ganey Rowther* case that I have just cited. In that case, in reference to s. 33(i)(a) of the Bankruptcy Enactment 1912, Thorne Ag. CJ said at p. 99:

> *Per contra* I understand it to be argued that the words 'without the previous sanction of the Official Assignee' necessarily meant this, that if the bankrupt does receive the sanction of the Official Assignee, he can maintain an action in respect of any property of any kind whatsoever, which was in his order and disposition at the time of the bankruptcy.
>
> I regret that I am unable to accept that proposition. In my view the Official Assignee by his sanction only intimates his consent to the bankrupt's bringing or continuing an action. The legislature did not intend, and the section does not mean, that by his sanction the Official Assignee can divest himself of the property, either real or personal, which is vested in him by the receiving order or under an order of adjudication, and revest that property in the bankrupt for the purpose of bringing an action.

Accordingly, Laksamana's counsel argued that the sanction of the official assignee was not effective or sufficient to divest the official assignee of Goh's property that had statutorily vested in the official assignee and to revest it in Goh so as to give him a cause of action, and therefore the *locus standi*, to

bring a counterclaim in respect of the property. Counsel submitted that the proper way of giving Goh the right to sue would be for the official assignee to assign the property to Goh by virtue of the official assignee's power to sell under s. 60(a), which gives him power to:

> sell all or any part of the property of the bankrupt, including the good-will of his business, if any, and the book-debts due or growing due to him, by public auction or private contract, with power to transfer the whole thereof to any person or company or to sell the same in parcels.

For authority as to the official assignee's power to assign by virtue of that provision, Laksamana's counsel cited *Ramsey v. Hartley* [1997] 1 WLR 186, a decision of the English Court of Appeal concerning the power to assign under s. 55(1) of Bankruptcy Act 1914, which section is identical with our s. 60(a).

The only answer made by Goh's counsel to *K. Ismail Ganey Rowther* was merely to say that no authorities were cited for the views expressed therein and that those views were merely in the nature of observations. They were not mere observations but constituted the opinion of the Court of Appeal on the issue that arose in that case, and even though no authorities were cited in support of them, I see no reason to question their soundness. I hold, therefore, that, Goh's property being vested in the official assignee, Goh did not have a cause of action on which to sue in respect of the property in this case, and therefore did not have *locus standi* to do so, and that the official assignee's sanction under s. 38(1)(a) did not serve the purpose of revesting the property in Goh so as to give him cause of action and *locus standi*.

It was submitted on behalf of the official assignee that the sanction was sufficient to vest Goh with *locus standi* in respect of the property. As I said, in law it was not sufficient, and even if, as represented to us by the senior federal counsel – though I make no such finding – it has been the practice of the official assignee, whenever he wishes to give a bankrupt the *locus standi* to sue in respect of his property that is vested in the official assignee, to do so by merely giving his sanction under s. 38(1)(a), the fact remains that in law the practice is insufficient to achieve the desired object.

Goh's counsel cited *Re Khoo Kim Hock* [1974] 2 MLJ 29 in support of his contention that the sanction under s. 38(1)(a) was sufficient to give Goh *locus standi* to sue in counterclaim. That case, however, does not assist Goh to overcome the obstacle of *K. Ismail Ganey Rowther*. The question in that case was whether a bankrupt could apply for annulment of the adjudication order without the sanction of the official assignee under s. 38(1)(a). In considering the section, Mohamed Azmi J (as he then was) said this at p. 30 E-F (left):

> The exception contained within brackets in section 38(1)(a)clearly indicates that the section is intended to apply only to actions for recovery of something – either real or personal – which can be turned into assets such as a claim for recovery of property or money due.

The learned judge was, however, making that statement only in a general way, that is to say, apart from the question of property being vested in the official assignee, and I say that because further on on that page, at C-E (right), he demonstrated his awareness of *K. Ismail Ganey Rowther* and his appreciation of the law as stated therein. This is what he said:

> In that case, where the court had considered section 33(i)(a) of the Bankruptcy Enactment 1912, which is the forerunner of our present section 38(1)(a), Thorne Ag. CJ rightly did not accept the proposition that the words "without the previous sanction of the Official Assignee" mean that if the bankrupt received the sanction of the Official Assignee he could maintain an action in respect of any property of any kind whatsoever which was in his order and disposition at the time of the bankruptcy. In his view, the legislature did not intend, and the section did not mean that by his sanction the Official Assignee can divest himself of the property either real or personal, which is vested in him by the receiving order or under an order of adjudication, and revest that property in the bankrupt for the purpose of bringing an action. It is therefore clear that the legal proposition as expounded by Thorne Ag. C.J. is only confined to the property of a bankrupt which is vested in the Official Assignee.

He then went on to decide:

> In my view, since the present application does not come within the meaning of "property" as defined by section 2, it does not vest in the Official Assignee, and as such it is not necessary for the bankrupt to obtain the prior sanction of the Official Assignee.

Goh's counsel, however, raised a point of procedure which merits serious consideration. It is based on O. 18 r. 8(1) of the Rules of the High Court 1980, which provides as follows:

> A party must in any pleading consequent to a statement of claim plead specifically any matter, for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality:
>
> (a) which he alleges makes any claim or defence of the opposite party not maintainable; or
>
> (b) which, if not specifically pleaded, might take the opposite party by surprise; or
>
> (c) which raises issues of fact not arising out of the preceding pleading.

Counsel submitted that Laksamana, who, although aware that Goh was a bankrupt, did not plead the l*ocus standi* point in defence of Goh's counterclaim but instead proceeded in the trial on the basis that Goh had *locus standi*, ought not to be allowed to question Goh's *locus standi* in submission. Counsel submitted that if the point had been raised earlier, curative steps could have been taken, such as bringing in the official assignee as a party, or the official assignee could have been examined on matters concerning the sanction under s. 38(1)(a), a provision which counsel said did not exist in other jurisdictions. Applying O. 18 r. 8(1) to this case, I assume that counsel intended to say that the question of Goh's *locus standi* was a "matter" falling under paras. (a) and (b) and that, under para. (a), it was a "matter … which (Laksamana) alleges makes (the) claim … of (Goh) not maintainable".

In reply to that objection, Laksamana's counsel submitted that when a question of law is raised that has not been pleaded, the other party can either object to it or deal with the question and that in this case the judge gave directions for the question to be submitted on and Goh did not appeal against the directions, so that the question was rightly before this court since it had been argued before the judge and decided. Before I proceed further, I wish to straight away make two observations about that submission. First, according to the notes of proceedings, in his submission before the judge on the question of locus standi, Goh's counsel did object to the *locus standi* point being raised at that late stage. Of course, in case his objection should fail, he did continue to submit on the merits of the question of *locus standi*. Secondly, it was not Goh's point that the issue of *locus standi* should not be raised in the appeal. His point in this appeal was that it should not have been raised before the judge, who ought, therefore, to have disallowed the issue to be canvassed. He was merely repeating the stand that he had taken before the judge, hoping that we would agree with him. If he is right that the issue should not have been allowed to be raised in the High Court, then it should not be considered in this appeal, and this appeal should be decided as if there were no such issue before us. To enable Goh to contend at the appellate stage that the issue should not have been raised in the High Court, I do not think it is necessary for Goh to have appealed against the judge's decision to allow the issue to be argued. It was proper for him to await the decision on the issue. If it were decided against him and for that reason his claim was dismissed, he could appeal and raise the admission of the issue as one of the grounds. If it were decided in his favour and his claim succeeded, he could await Laksamana's appeal, and if Laksamana raised his *locus standi* as a ground of appeal, he could raise objection to the admission of the *locus standi* issue in reply to Laksamana's ground, as he has now done.

To return to the reply of Laksamana's counsel, the authority that he cited in support of his reply is an editorial statement in the notes to O. 18 r. 8 at p. 482 of the *Malaysian High Court Practice*, 1998 Desk Edition, Vol. 1, which runs thus: "It is to be noted that where the matter is not pleaded, the court can either disallow the party from relying on it or allow the party to amend his pleading and/or take that matter into consideration in deciding the case". The leading authority referred to in the notes for that statement is *Superintendent of Lands and Surveys (4th Div) v. Hamit bin Matusin* [1994] 3 CLJ 567. After reading the authority, which is that of the Supreme Court, I find not only that the editorial statement does not accurately reflect the essential decision in that case but also that the decision was not about O. 18 r. 8, although the rule is cited at p. 570, but about O. 18 r. 7(1). Except that it was cited, O. 18 r. 8 did not at all come into consideration in the judgment. I further find that the situation in that case, and the problem that arose from it, were entirely different from those in the present case.

Without stating the actual facts, the situation in that case was one where, in the pleadings, the plaintiffs asserted a certain right and the defendants denied the plaintiffs' right but without stating the reason why. It was only at the trial that the defendants adduced facts constituting the ground for denying the right asserted by the plaintiffs, which ground would amount to a complete defence, but the plaintiffs did not object to the introduction of those facts when they were introduced. It was only in the submission at the end of the trial that the evidence of those facts was impugned. It is to be noted that the situation was entirely different from that in this case, where the matter objected to, that is Goh's *locus standi*, was raised for the first time during submission and at no time did the opposing party, Goh, not object to the question being raised.

The trial judge in that case agreed with the plaintiffs that the evidence adduced by the defendants ought to be disregarded because the defendants had been in breach of O. 18 r. 7(1), which provides as follows:

> Subject to the provisions of this rule and rules 10, 11 and 12, every pleading must contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the case admits.

The Supreme Court agreed that the facts that the defendants relied on for their defence were material facts and ought to have been pleaded, but held that, the rationale for requiring material facts to be pleaded being to prevent the opposing party from being taken by surprise, the failure of the plaintiffs to object to the evidence there and then meant that they were not taken by surprise. To

object later at submission stage would be too late as the defendants would be deprived of a possible opportunity of amending their defence, which opportunity they might have had, had the objection been raised there and then. The Supreme Court further held that failure to object to the evidence there and then had the effect of curing the pleading of its failure to state the material facts, unless the evidence was a radical departure from the pleaded defence, but the evidence was not a radical departure from the pleaded defence but only a development of it.

The decision in that case is therefore not applicable to the present case, not only because the situation and problem were different but also because it was a decision on O. 18 r. 7(1), whereas Goh's objection to the *locus standi* question being raised is an objection based on O. 18 r. 8.

There has, therefore, been no sufficient answer to Goh's objection that the absence of Goh's *locus standi* not having been pleaded in their defence, and being raised for the first time only in submission, Laksamana were precluded from raising it as a defence. Although, as I find on the second part of Laksamana's argument, which part involves only a question of law, Goh had no *locus standi*, no authority has been cited to the effect that where the absence of a plaintiffs' *locus standi* is obvious from the law, the plaintiffs' claim must in any event be disallowed, even though the absence of *locus standi* has not been pleaded as a defence. Where illegality is concerned, for example, although it is not pleaded, the court ought to dismiss a claim based on an illegal contract. See, for example, *North Western Salt Co v. Electrolytic Alkali Co* [1914] AC 461. But the question of *locus standi* in this case is nothing as serious as the question of enforcing an illegal contract, and I say so because if Goh finally succeeds in his claim the damages awarded to him would vest in the official assignee and because the official assignee, by his attitude in the High Court and before us, obviously has no objection to Goh suing despite Laksamana's contention that the property in this case and the right to sue in respect thereof vest in the official assignee and not in Goh. I would therefore hold that in the circumstances of this case Laksamana ought not to be allowed to raise and pursue the *locus standi* issue, and I would dismiss Laksamana's appeal as far as it is grounded on *locus standi.*